

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARLON H. CRYER, individually and
on behalf of a class of all other
persons similarly situated, and
on behalf of the Franklin
Templeton 401(k) Retirement Plan,

Plaintiff,

v.

FRANKLIN RESOURCES, INC.; and THE
FRANKLIN TEMPLETON 401(k)
RETIREMENT PLAN INVESTMENT
COMMITTEE,

Defendants.

No. C 16-4265 CW

ORDER DENYING
FRI'S MOTION FOR
RECONSIDERATION
AND GRANTING-IN-
PART FRI'S MOTION
TO STRIKE

(Docket Nos. 73
and 80)

Defendants Franklin Resources, Inc. and The Franklin
Templeton 401(k) Retirement Plan Investment Committee (FRI) move
for reconsideration of the Court's order granting Plaintiff's
motion for class certification (Docket No. 67). The Court ordered
Plaintiff Marlon H. Cryer to file an opposition and permitted FRI
to file a reply and the parties did so.¹ Having considered the
papers submitted by the parties, the Court DENIES FRI's motion for
reconsideration.

¹ Cryer also submitted a notice of supplemental authority
along with two pages of additional argument. Docket No. 79. FRI
moved to strike the additional argument. Docket No. 80.
Consistent with Civil Local Rule 7-3(d)(2), the Court considers
the underlying cases cited by Cryer's notice, but not any argument
contained in the notice.

BACKGROUND

The parties are familiar with the facts of this case, and so the Court provides only the facts most relevant to the resolution of FRI's motion for reconsideration.

FRI is a financial services company that provides investment products, including mutual funds, to individual and institutional investors. Since 1981, it has sponsored a 401(k) plan for its employees. Complaint ¶¶ 14, 18. The plan is a "defined contribution plan" under 29 U.S.C. § 1002(34) and an "employee pension benefit plan" under 29 U.S.C. § 1002(2). Id. at ¶¶ 15-16.

Cryer is a former employee of FRI and a former member of FRI's 401(k) retirement plan. On February 12, 2016, Cryer was terminated from his employment with FRI. Docket No. 58-13 at 1. On February 13, 2016, Cryer signed a document entitled "Confidential Agreement and General Release" (severance agreement). Id. at 1, 12. The severance agreement contained a "general release" provision whereby "the Employee" (Cryer) agreed to release all claims against FRI, including "all common law, contract, tort or other Claims the Employee might have, as well as Claims the Employee might have under the . . . Employee Retirement Income Security Act of 1974." Id. at 3. The "general release" provision is followed by a "carve-out" provision which states that "the Employee does not release any rights that the law does not permit the Employee to release." Id. at 4. The "carve-out" provision goes on to state that the Employee does not release "any right that relates to: . . . (iii) the Employee's vested participation in any qualified retirement plan." Id.

1 The severance agreement also contains a "class action waiver"
2 provision which states:

3 (g) **Surrender of Class Participation.** By executing this
4 Confidential Agreement, the Employee waives and
5 surrenders any right to become, and promises not to
6 consent to become, a member of any class or collective
7 action in which claims are asserted against any Released
8 Party related in any way to the Employee's employment,
9 or the termination of Employee's employment, with the
Company. If, without the prior knowledge or consent of
the Employee, the Employee is made a member of any such
class or collective action in any proceeding, the
Employee agrees immediately to opt out of the class or
collective action at the first opportunity and to forego
and not accept any personal relief in such action.

10 Id. at 5.

11 On July 28, 2016, Cryer, "individually and as representative
12 of a class of similarly situated persons," brought suit against
13 FRI pursuant to ERISA § 502(a)(2), asserting FRI breached its
14 fiduciary duties to the Franklin Templeton 401(k) Retirement Plan.
15 Complaint ¶ 1. Cryer seeks restoration of all losses to the plan
16 arising from FRI's alleged breach of fiduciary duties. Id. at 21.

17 On October 24, 2016, FRI brought a motion for summary
18 judgment, contending that Cryer could not advance his claims
19 because he had released them in his severance agreement. Order on
20 Motion for Summary Judgment at 6. Specifically, FRI argued that
21 Cryer's claims are barred by the "general release" provision. See
22 id. at 3-4. The Court rejected FRI's motion. Id. at 6-8.

23 Relying on Bowles v. Reade, 198 F.3d 752 (9th Cir. 1999), the
24 Court held that Cryer could not give up the claims that he brought
25 on behalf of the plan. Id.

26 On June 9, 2017, Cryer brought a motion to certify a class of
27 all current and former participants in the Franklin Templeton
28 401(k) Retirement Plan from July 28, 2010 to the present. Motion

1 to Certify Class. FRI argued that Cryer's severance agreement's
2 "class action waiver" provision prevented Cryer from serving as
3 the class representative in this case. The Court rejected FRI's
4 argument, finding that the severance agreement's "class action
5 waiver" provision was not enforceable under Morris v. Ernst &
6 Young, LLP, 834 F.3d 975, 983 (9th Cir. 2016). Order on Class
7 Certification at 7. FRI made a number of other arguments against
8 class certification, which the Court rejected. Ultimately, the
9 Court granted Cryer's motion for class certification. Id. at 16.

10 On August 8, 2017, FRI sought reconsideration of the Court's
11 order granting class certification.

12 DISCUSSION

13 FRI urges the Court to reconsider its decision that Cryer's
14 severance agreement's "class action waiver" provision is not
15 enforceable under the National Labor Relations Act (NLRA) and
16 Morris. On its face, the language of the "class action waiver"
17 provision would seem to prevent Cryer from becoming a member of a
18 class action such as this one.

19 In its motion for reconsideration, FRI informs the Court that
20 Cryer signed the severance agreement on February 13, 2016, a day
21 after his employment terminated. Motion at 5; see also Docket No.
22 58-13 at 1, 12. This is material to the Court's decision because
23 Morris holds that class action waivers are unenforceable under the
24 NLRA when they are required by the employer as a condition of
25 employment. Morris, 834 F.3d at 983, 990 ("The NLRA precludes
26 contracts that foreclose the possibility of concerted work-related
27 claims. An employer may not condition employment on the
28 requirement that an employee sign such a contract."). If,

1 however, a class action waiver is signed after employment has
2 already ended, then it cannot be said to be required by an
3 employer as a condition of employment, and may be enforceable.
4 See id. Cryer signed the severance agreement and its "class
5 action waiver" provision after his employment had already
6 terminated, and not as a condition of continued employment. See
7 Birdsong v. AT & T Corp., 2013 WL 1120783, at *6 (N.D. Cal. Mar.
8 18, 2013) (in holding that a class action waiver signed as part of
9 a severance agreement was enforceable, noting "that Plaintiff
10 signed the instant release agreement after her employment had
11 ended, rather than as a precondition to employment or to continued
12 employment."). Accordingly, Morris does not render the provision
13 unenforceable.

14 Cryer argues that the NLRA and Morris protect former
15 employees as well as current employees. As the Morris court
16 recognized, however, the NLRA protects the rights of "employees"
17 as defined by the statute. Morris, 834 F.3d at 981 ("The NLRA
18 establishes the rights of employees in § 7."). The NLRA defines
19 the term "employee" as follows:

20 The term "employee" shall include any employee, and
21 shall not be limited to the employees of a particular
22 employer, unless this subchapter explicitly states
23 otherwise, and shall include any individual whose work
has ceased as a consequence of, or in connection with,
any current labor dispute or because of any unfair labor
practice.

24 29 U.S.C. § 152(3) (emphasis added). Read plainly, the statute
25 protects only (1) current employees and (2) former employees whose
26 work ceased because of or in connection with "any current labor
27 dispute or because of any unfair labor practice." Cryer does not
28

1 allege that his work ceased because of or in connection with "any
2 current labor dispute or because of any unfair labor practice."

3 Cryer also cites a number of out-of-circuit cases to support
4 his position on this point, but none is persuasive. Cryer cites
5 Cellular Sales of Missouri, LLC v. NLRB, 824 F.3d 772, 779 (8th
6 Cir. 2016), to show that "a former employee continues to be an
7 'employee' within the meaning of the NLRA." Opposition at 2. In
8 that case, however, the court considered a mandatory employment
9 agreement whereby the employee agreed as "a condition of his
10 employment" to arbitrate individually all claims related to his
11 employment and found that it was unenforceable under the NLRA.
12 Id. at 774, 778. Because the offending agreement was executed as
13 a condition of employment, Cellular Sales of Missouri, LLC is
14 consistent with Morris. Cryer also cites Hayes v. Bayer
15 Cropscience, LP, 139 F.3d 795, 803 (S.D.W.V. 2015), for the
16 assertion, "Severance pay is a term and condition of employment
17 . . . under the NLRA." But this case merely states that the NLRA
18 requires union leadership and employers to bargain in good faith
19 about conditions of employment, including severance pay, which
20 becomes clear if the quotation is read as a whole. See id.
21 ("Severance pay is a term and condition of employment subject to
22 mandatory bargaining under the NLRA.") (emphasis added). That
23 does not mean that the NLRA applies to preclude a term in a
24 severance agreement that a former employee signed after his
25 employment had already ended.

26 Even if the NLRA and Morris do not bar enforcement of the
27 "class action waiver" provision, the provision may be
28 unenforceable for a different reason. Cryer argues in the

1 alternative that, because he is bringing this action as a plan
2 participant on behalf of the plan pursuant to § 502(a)(2), the
3 "class action waiver" provision he signed cannot be used to waive
4 substantive rights which belong to the plan. Opposition at 4.
5 FRI responds that the "class action waiver" provision does not
6 affect any substantive rights belonging to the plan. Reply at 2.

7 The Court previously adjudicated a similar issue in its order
8 on FRI's motion for summary judgment. FRI argued that Cryer
9 released the claim-in-suit when he signed the "general release"
10 provision in his severance agreement. Order on Motion for Summary
11 Judgment at 6. Cryer responded by citing the Ninth Circuit's
12 decision in Bowles v. Reade, which held that a plan participant
13 cannot settle, without the plan's consent, a § 502(a)(2) breach of
14 fiduciary duty claim seeking "a return to [the plan] and all
15 participants of all losses incurred and any profits gained from
16 the alleged breach of fiduciary duty." 198 F.3d 752, 760 (9th
17 Cir. 1999). Because Cryer seeks to bring the same type of claim
18 to restore value to the plan, he could not have released the claim
19 without the consent of the plan. Order on Motion for Summary
20 Judgment at 6. The Court agreed with Cryer, holding that he did
21 not release the claim for breach of fiduciary duty. Id. at 7-8.

22 Cryer now contends that Bowles' reasoning also bars
23 enforcement of the "class action waiver" provision. Cryer argues
24 that the "class action waiver" provision cannot be enforced
25 because it constitutes a waiver of the plan's rights, citing Munro
26 v. Univ. of S. California, No. CV166191VAPCFEX, 2017 WL 1654075,
27 at *4 (C.D. Cal. Mar. 23, 2017) in support of his position.
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1 The Munro court considered whether an arbitration agreement signed
2 by employees at the start of their employment could bind the
3 employees to arbitrate their ERISA § 502(a)(2) claims on behalf of
4 the plan, noting that it was an issue of first impression in the
5 Ninth Circuit. Id. at *3. The Munro court followed the reasoning
6 in Bowles and held, "Just as a participant suing on behalf of a
7 plan under § 502(a)(2) cannot waive a plan's right to pursue
8 claims, a participant cannot waive a plan's right to file its
9 claims in court." Id. at *5.

10 The Munro court noted that participants cannot "abandon even
11 their own claims under § 502(a)(2) to sue on the plans' behalf."
12 Id. (citing cases); see also Bowles, 198 F.3d at 761 (holding that
13 Bowles properly "remained as plaintiff in her representative
14 capacity" even though her own individual claims had been
15 released). Accordingly, the Munro court ruled that the
16 arbitration agreement could not be enforced against the
17 plaintiffs, who could continue to pursue their claims in court.
18 Id. at *7. The decision whether to arbitrate a claim is a right
19 that belongs to the plan, and "it cannot be bargained away without
20 the plan's consent." Id. This holding makes "practical sense and
21 is closely aligned with the goals of ERISA." Id. at *6. If
22 individual employees' arbitration agreements could affect their
23 ability to bring § 502(a)(2) claims on behalf of the plan in
24 court, then "fiduciaries could mitigate their ERISA obligations to
25 their plans and erect barriers to ERISA enforcement on behalf of
26 plans by requiring employees to sign arbitration agreements." Id.
27 Fiduciaries could similarly require employees to sign "provisions
28 requiring confidentiality, expedited arbitration procedures,

1 limited discovery, required splitting of arbitrators' fees, and
2 mandatory payment of the prevailing party's attorneys' fees" --
3 all of which would "give fiduciaries many procedural advantages"
4 and discourage participants from bringing suit to hold fiduciaries
5 accountable in court for potential wrongdoing. Id.

6 The same reasoning applies here. The decision whether to
7 file a § 502(a)(2) claim as a class action is a right that belongs
8 to the plan, and it cannot be bargained away without the plan's
9 consent. Accordingly, the "class action waiver" provision cannot
10 be enforced against Cryer, who brought § 502(a)(2) claims in this
11 case behalf of the plan. If individual participants' class action
12 waivers could affect their ability to bring a § 502(a)(2) claim as
13 a class action, then this could prevent fiduciaries from being
14 held accountable in court for potential wrongdoing.

15 The ability to file a § 502(a)(2) claim as a class action is
16 an important one. Participants bringing a § 502(a)(2) claim act
17 in a representative capacity on behalf of the plan and are bound
18 to "employ procedures to protect effectively the interests they
19 purport to represent." Coan v. Kaufman, 457 F.3d 250, 259 (2d
20 Cir. 2006); see also Massachusetts Mut. Life Ins. Co. v. Russell,
21 473 U.S. 134, 142 n.9 (1985). Representatives can discharge their
22 duty by ensuring absent participants are properly represented,
23 joining or making a good faith effort to join other participants,
24 or filing a class action pursuant to Rule 23. Coan, 457 F.3d at
25 259-60. Where the number of participants is large, a class action
26 may be the most appropriate procedural device. Id. at 260; see
27 also Shady Grove Orthopedic Associates v. Allstate Ins. Co., 559
28 U.S. 393, 402 (2010) (Rule 23 provides "procedural fairness and

1 efficiency"). Accordingly, the right to seek class certification
2 is important for fair resolution of § 502(a)(2) claims, and cannot
3 be bargained away without the plan's consent.

4 CONCLUSION

5 For the foregoing reasons, the Court DENIES FRI's motion for
6 reconsideration (Docket No. 73).

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8 IT IS SO ORDERED.

9 Dated: October 4, 2017



10 CLAUDIA WILKEN
11 United States District Judge
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